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No. 93-1020

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

Organizacion JD Ltda., and Manufacturas JD Ltda.,

Petitioners,

v.

United States of America, The Drug Enforcement Administration, Banco Atlantico, and The Bank of New York,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF

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60 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES v

I. THE SECOND CIRCUIT ERRED IN DENYING THE CLAIM FOR DAMAGES AGAINST THE GOVERNMENT AND THE INTERMEDIARY BANKS FOR VIOLATION OF 28 U.S.C. § 2510 ET AL., IN BOTH THE INTERMEDIARY BANK CASE AND THE ALL FUNDS CASE BECAUSE THE DECISIONS ARE A DE FACTO AFFIRMATION OF JUDGE WEINSTEIN'S USE OF THE "RELATION BACK DOCTRINE." 3

II. THE SECOND CIRCUIT DECISION IN THE INTERMEDIARY BANK CASE MUST BE REVERSED BECAUSE IT IS INTERNALLY INCONSISTENT REGARDING THE PROTECTION GIVEN BY CONGRESS TO ELECTRONIC COMMUNICATION IN TRANSIT AND IN COMPUTER STORAGE FOR LESS THAN 180 DAYS. 6

III. BECAUSE THE INTERMEDIARY BANKS WERE FOLLOWING ONLY THE VERBAL ORDER OF TWO ASSISTANT UNITED STATES ATTORNEYS, THE SECOND CIRCUIT ERRED IN DENYING THE LIMITED PARTNERSHIPS' CLAIM FOR DAMAGES UNDER 28 U.S.C. §§ 2520 AND 2707. 8

IV. BECAUSE THE GOVERNMENT FAILED TO COMPLY WITH 18 U.S.C. § 2518(7), THE SECOND CIRCUIT ERRED IN DENYING THE LIMITED

PARTNERSHIPS CLAIM UNDER THE FOURTH AND FIFTH AMENDMENTS. . 10

V. SINCE THE INTERMEDIARY BANKS WERE OBLIGATED UNDER BOTH FEDERAL LAW, AND GENERAL BANKING LAW, TO NOT DEVIATE FROM THE ACCEPTED INSTRUCTIONS IN THE THREE ELECTRONIC FUNDS TRANSFER, THE LIMITED PARTNERSHIPS HAVE A VALID CAUSE OF ACTION FOR BREACH OF CONTACT. 12

CONCLUSION 16

APPENDIX

A. Opinion of the United States Court of Appeals for the Second Circuit dated February 24, 1994, in Organizacion J.D. Manufacturas J.D. Ltda. v. U.S. Dept of Justice, the Drug Enforcement Administration, Banco Atlantico, S.A. and the Bank of New York, appeal docketed, No. 93-6019 __ F3rd. ___ (1993) 1a

B. THE ELECTRONIC COMMUNICATIONS PRIVACY ACT OF 1986, 28 U.S.C. §§ 2501 et seq. and §§ 2701 et seq.

CHAPTER 119-WIRE AND ELECTRONIC COM-MUNICATIONS INTERCEPTION AND INTER-CEPTION OF ORAL COMMUNICATIONS

18 U.S.C. § 2510. Definitions . . 1b

18 U.S.C. § 2511(1)(a). Interception and disclosure of . . .electronic communications prohibited 2b

18 U.S.C. § 2511(1)(c) 2b

18 U.S.C. § 2511(2)(a)(i) . . . 2b

18 U.S.C. § 2511(3)(a) 2b

18 U.S.C. § 2516(3). Authorization for interception of . . . electronic communications 3b

18 U.S.C. § 2518(7). Procedures for interception of . . . electronic communications 3b

18 U.S.C. § 2518(9) 5b

18 U.S.C. § 2518(10)(c) 5b

18 U.S.C. § 2520. Recovery of civil damages authorized 5b

CHAPTER 121-STORED WIRE AND ELECTRONIC COMMUNICATIONS AND TRANSACTIONAL RECORDS ACCESS

18 U.S.C. § 2701. Unlawful access to stored communications 6b

18 U.S.C. § 2702. Disclosure of contents 7b

18 U.S.C. § 2703. Requirements of government access 8b

18 U.S.C. § 2707. Cause of action 11b

18 U.S.C. § 2711. Definitions for chapter 12b

TABLE OF AUTHORITIES

Cases:

Manufacturas International, Ltda., v. Manufacturers Hanover Trust Co., and Consolidated Cases, 792 F.Supp. 180 (E.D.N.Y.), appeal withdrawn pending final decision in All Funds Case, No. 92-7360 (2d Cir. 1992) 2, 3, 4, 5

Organizacion J.D. Manufacturas J.D. Ltda. v. U.S. Dept of Justice, the Drug Enforcement Administration, Banco Atlantico, S.A. and the Bank of New York, appeal docketed, No. 93-6019 (2nd Cir. 1993) 2

Southern Electric Supply Co. v. Raleigh County National Bank, 320 S.E.2d 515 (W.Va. 1984) 14

United States v. 92 Buena Vista Avenue, 113 S.Ct 1126 (1993) 5

United States v. James Danial Good Real Property, 114 S.Ct. 492, (1993) . . . 11

United States v. Johnny Daccarett, 801 F.Supp. 984, 6 F.3d 37 (2d Cir. 1993) 2, 4, 5

Constitution, and Statutes:

12.2 of the Supreme Court Rules . . . 1

18 U.S.C. § 2511(1)(a) 3

18 U.S.C. § 2511(1)(c) 3

18 U.S.C. § 2511(3)(a) 3

18 U.S.C. § 2518(7) 12

18 U.S.C. § 2702(a) 3

18 U.S.C. § 2703(a) 4, 7, 9

18 U.S.C. § 2707(d) 10

28 U.S.C. § 2101(c) 1

28 U.S.C. § 2518 7

Federal Reserve Act, section 13 (12 U.S.C. 342), paragraph (f) of section 19 (12 U.S.C. 464), paragraph 14 of section 16 (12 U.S.C. 248(o)), paragraph (i) and (j) of section 11 (12 U.S.C. 248(i) and (j)) 16

Legislative History:

House Report No. 647, 99th Congress, 2nd Session (1986) 6

Miscellaneous:

Bank Deposits 15

D. Baker & R. Brandel, The Law of Electronic Fund Transfer Systems, ¶1.01(2d ed. 1988) 13

The Law of Bank Deposits, Collections and Credit Cards, 3rd. Ed. (1990) by B.Clark, and A. Squillante, Warren, Gorham & Lamont, 1990 Supp. 13

The Law of Electronic Commerce, Benjamin Wright, Little, Brown and Co. (1991)6,11

Uniform State Laws and the American Law Institute, Article 4A 13, 15

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PETITION FOR WRIT OF CERTIORARI TO
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SUPPLEMENTAL BRIEF

This Petition for Writ of Certiorari No. 93-1020, is now amended to seek simultaneous review pursuant to 28 U.S.C. § 2101(c), and 12.2 of the Supreme Court Rules of the two final decisions that

have now been entered by the United States Court of Appeals for the Second Circuit (hereinafter "Second Circuit"), as to Organizacion J.D. Ltda., and Manufacturas J.D. Ltda., (hereinafter "Limited Partnerships"), claims for damages in United States v. Johnny Daccarett, 801 F.Supp. 984, 6 F.3rd 37 (2d Cir. 1993) (hereinafter "All Funds Case") (App. 1b);[1] and, Organizacion J.D. Manufacturas J.D. Ltda. v. U.S. Dept of Justice, the Drug Enforcement Administration, Banco Atlantico, S.A. and the Bank of New York, appeal docketed, No. 93-6019, ___F3rd. ___ (2nd Cir. February 24, 1994) (hereinafter the "Intermediary Bank Case")(App. A-1a).

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[1]"App. A- " references are to the section and page number in the attached Appendix. "App. " references are to the section and page number in the Appendix filed with the Petition. "Lod. " references are to the page number in the Lodging filed and submitted with this Petition.

I. **THE SECOND CIRCUIT ERRED IN DENYING THE CLAIM FOR DAMAGES AGAINST THE GOVERNMENT AND THE INTERMEDIARY BANKS FOR VIOLATION OF 28 U.S.C. § 2510 ET AL., IN BOTH THE INTERMEDIARY BANK CASE AND THE ALL FUNDS CASE BECAUSE THE DECISIONS ARE A DE FACTO AFFIRMATION OF JUDGE WEINSTEIN'S USE OF THE "RELATION BACK DOCTRINE."**

In its decision dated February 24, 1994, in the Intermediary Bank Case the Second Circuit affirmed Judge Jack B. Weinstein's dismissal of the Limited Partnerships, claims for damages:

(i) under 18 U.S.C. § 2511(1)(a)[2], against the United State and Drug Enforcement (hereinafter "Government"), for their procuring of the interception of the Limited Partnerships three in transit electronic fund transfer communications (App. A-11a); and,

(ii) under 18 U.S.C. § 2511(1)(c), 18 U.S.C. §2511(3)(a), and 18 U.S.C. §

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[2]See Appendix B for statute sections.

2702(a), against Banco Atlantico and the Bank of New York (hereinafter "Intermediary Banks"), for their unauthorized disclosing and divulging of the Limited Partnerships' electronic fund transfer communications in transit, and in computer storage held for less than 180 days without a warrant issued under the Federal Rules of Criminal Procedures in accordance with 18 U.S.C. § 2516, and 18 U.S.C. § 2703(a) (App. A-5a and A-12a).

This holding of the Second Circuit was based on Judge Weinstein's decisions in Manufacturas Internacional, Ltda., v. Manufacturers Hanover Trust Co., and Consolidated Cases, 792 F.Supp. 180 (E.D.N.Y.), appeal pending, No. 92-7360 (2d Cir. 1992) (hereinafter the "Consolidated Bank Case"), and the All Funds Case (App. A-5a, A-6a and A-10a)

However, Judge Weinstein based his decision on the "relation back doctrine" prior to there being a final forfeiture judgement, in both the Consolidated Bank Case (App. 50e), where all discovery was barred, and where the Second Circuit repeatedly still refuses all efforts to have it review this pending appeal that was timely filed and perfected, and in the All Funds Case (App-48a to 51a).

Therefore based on this Court's decision in United States v. 92 Buena Vista Avenue, 113 S.Ct 1126 (1993), the Second Circuit's decision in both the All Funds Case and the Intermediary Bank Case must be reversed.

II. THE SECOND CIRCUIT DECISION IN THE INTERMEDIARY BANK CASE MUST BE REVERSED BECAUSE IT IS INTERNALLY INCONSISTENT REGARDING THE PROTECTION GIVEN BY CONGRESS TO ELECTRONIC COMMUNICATION IN TRANSIT AND IN COMPUTER STORAGE FOR LESS THAN 180 DAYS.

Because electronic communication messages stored by the Intermediary Banks in their capacity as electronic communication services for fewer than 180 days are intended to facilitate in transit communication, Congress provided the same level of privacy as it required for in transit communication, House Report No. 647, 99th Congress, 2nd Session, at page 68 (1986).[3]

Therefore before permitting Govern-ment access to either electronic commu-

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[3]See §19.5, at p. 375, The Law of Electronic Commerce, Benjamin Wright, Little, Brown and Co. (1991) (hereinafter The Law of Electronic Commerce").

nications either in transit or in computer storage a warrant issued by a judge under the Federal Rules of Criminal Procedures must be obtained pursuant to 28 U.S.C. § 2518 and 18 U.S.C. § 2703(a).

Consequently, the Second Circuit's opinion is internally inconsistent, and must be reversed, since on the one hand the Second Circuit permits an action for damages against the Government for the obtaining of access to electronic communication in computer storage, including that which has been in storage for less than 180 days and is considered in transit; but on the other hand the Second Circuit denies the right to damages against the Government for procuring the interception of electronic communication in transit by the programming of "stop ques" in the Intermediary Banks computer modems, the placing of the information by

the Intermediary Banks in computer storage for less than 180 day, and then the disclosing of the information to the Government.

III. BECAUSE THE INTERMEDIARY BANKS WERE FOLLOWING ONLY THE VERBAL ORDER OF TWO ASSISTANT UNITED STATES ATTORNEYS, THE SECOND CIRCUIT ERRED IN DENYING THE LIMITED PARTNERSHIPS' CLAIM FOR DAMAGES UNDER 28 U.S.C. §§ 2520 AND 2707.

In the Intermediary Bank Case the Second Circuit remanded to the District Court the claim of the Limited Partnerships for damages against the Government under 18 U.S.C. § 2701 et seq. (App. A-8a). However, based on Judge Weinstein's holding in the Consolidated Bank Case, the Second Circuit held that the Intermediary banks could not be held liable under 18 U.S.C. § 2707(a), because of "their good faith reliance on a court warrant or order is a complete defense under § 2701(d)(1)" (App. A-8A).

This decision of the Second Circuit is in error and must be reversed for two reasons:

First, the undisputed facts are that Limited Partnerships' three electronic fund transfers were intercepted, placed into computer storage, and disclosed to the Government on July 24, and 26, 1990, three weeks before the Seventh In Rem Complaint was executed on August 8, 1990, based on only the verbal telephone order of Assistant United States Attorneys Arthur P. Hui and Gary R. Brown (See pages 18-19 of Petition); and,

Second, in accordance with 18 U.S.C. § 2703(a), the court warrant required to permit government access to electronic communication in computer storage for less than 180 is a "warrant issued under the Federal Rules of Criminal Procedures," not a self executing warrant

issued under Rule C of the Supplemental Rules For Certain Admiralty And Maritime Claims.

Thus, the Intermediary Banks do not meet any of the requirements under 18 U.S.C. § 2707(d), to maintain the defense of "good faith reliance," and the Second Circuit must be reversed.[4]

IV. BECAUSE THE GOVERNMENT FAILED TO COMPLY WITH 18 U.S.C. § 2518(7), THE SECOND CIRCUIT ERRED IN DENYING THE LIMITED PARTNERSHIPS CLAIM UNDER THE FOURTH AND FIFTH AMENDMENTS.

The Electronic Communication Privacy Act does not displace the Fourth and Fifth Amendments. It established a new statutory search standard, and a requirement of notice and an opportunity to be heard, to address Congress' concern

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[4]Neither does the defense of "good faith reliance" exist under 18 U.S.C. § 2520(d)(1).

for the future of technological development that are (presumably) at least equal to, if not higher than the Fourth and Fifth Amendment standards. See Law of Electronic Commerce, at page 373.

Consequently, although the Second Circuit did recognize that based on the this Court's holding in United States v. James Danial Good Real Property, 114 S.Ct. 492, 499-500 (1993), civil forfeiture can violate the Fifth Amendment, the Second Circuit again disregarded the newly crated statutory protection given to electronic communication either in transit or in computer storage.

The Second Circuit stated that, "because the seizures in this matter plainly involve exigent circumstances, and James Danial Good Court made clear that seizures involving exigent circumstances are

exempt for the predeprivation notice and hearing requirements" (App. A-10a).

But the Second Circuit disregarded the "exigent circumstances" exception which Congress required be met under 18 U.S.C. § 2518(7), thus Second Circuit was in clear error in stating that no cause of action exists under the Fifth Amendment, and must be reversed.[5]

V. SINCE THE INTERMEDIARY BANKS WERE OBLIGATED UNDER BOTH FEDERAL LAW, AND GENERAL BANKING LAW, TO NOT DEVIATE FROM THE ACCEPTED INSTRUCTIONS IN THE THREE ELECTRONIC FUNDS TRANSFER, THE LIMITED PARTNERSHIPS HAVE A VALID CAUSE OF ACTION FOR BREACH OF CONTACT.

The Limited Partnerships purchased in the Republic of Venezuela three electronic funds transfers to be sent to their office in the Republic of Colombia.

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[5]For the same statutory section the Second Circuit's analysis in the All Funds Case must be reversed as to the Fourth Amendment violations of illegal searches.

Thus the Limited Partnerships were both the originator and the beneficiary of said electronic funds transfer communication (Lod. 4, 6 and 7).[6]

Although electronic fund transfer communications currently involve the transferring of both domestic and international funds totaling over one trillion dollars each day,[7] there is a limited number of court decisions on the subject of liability of Intermediary Banks, thus it has been stated that a vacuum exists in this area of law.[8]

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[6]Given these facts the Second Circuit is denying due process and equal protection of laws by remanding the action against the Government.

[7] See D. Baker & R. Brandel, The Law of Electronic Fund Transfer Systems, ¶1.01(2d ed. 1988).

[8]The Law of Bank Deposits, Collections and Credit Cards, 3rd. Ed. (1990) by B.Clark, and A. Squillante, Warren, Gorham & Lamont, 1990 Supp., (hereinafter cited as "Bank Deposits") For this reason the commissioners on Uniform State Laws and the American Law Institute completed Article 4A, aimed at providing a comprehensive body of law governing the area. Id. ¶13.02[2], at p.13-5.

However, regarding the alleged liability of the Intermediary Bank for failure to comply with the electronic fund transfer instruction, in Southern Electric Supply Co. v. Raleigh County National Bank, 320 S.E.2d 515 (W.Va. 1984), there a court held in a suit by the beneficiary of a wire transfer, against a beneficiary bank for the conversion of funds without the beneficiaries' consent or authority by taking money designated for and deposit in its account and transferring it to another, that,

> [w]e would be hardpressed to think of a situation in which we could condone a bank's decision to ignore the instructions of a [sender] and unilaterally decide to alter [an electronic fund transfer]. To get a third party's funds, a bank would need explicit authority from the third party.... Whether the unauthorized person is a stranger, family, or bank officer, the withdrawal is wrongful. When a wire transfer comes to a bank, it is obligated by the transmission to cre-

dit the designated account. Id. 320 S.E.2d at 519

This holding is consistent with the technological reality that, "[an electronic fund transfer] is not really a direct transfer of funds from buyer to seller. Instead it is a series of trans actions. With the completion of each payment order, a bank becomes obligated to pay funds to the next link in the chain, culminating with the duty of the beneficiary's bank to pay the beneficiary. In other words, a `wire transfer' is a series of contractual obligations to pay rather than a direct exchange of funds from buyer to seller."[9]

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[9]Bank Deposits, ¶13.01, at p. 13-2. "UCC §4A-405 underscores the rule that an Article 4A fund transfer is simply a series of payment orders transmitted by a series of senders. When the various orders are accepted, obligations are created, but nothing is "transferred," and no "funds" are involved. Id., ¶13[2][2][c], at p. 13-8.

The fact is that when the Banks voluntarily decided to submit to the verbal telephone instruction they did so without any judicial order, and in violation of their obligations under Federal Reserve Act and its implementing regulations.[10] Thus the Second Circuit was in error and must be reversed.

CONCLUSION

The Supreme Court has before it, not only for the first time, challenges to both the actions of the Government and the Intermediary Banks in light of Congress' mandate under the Electronic Communications Privacy Act; but as importantly, the Court has before it Petitions in-

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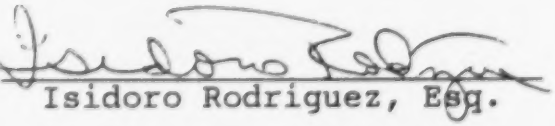
[10]The Board of Governors of the Federal Reserve System have issued regulations concerning the handling of wire transfers, in Subpart B-Wire Transfers of Funds, pursuant to the Federal Reserve Act, section 13 (12 U.S.C. 342), paragraph (f) of section 19 (12 U.S.C. 464), paragraph 14 of section 16 (12 U.S.C. 248(o)), paragraph (i) and (j) of section 11 (12 U.S.C. 248(i) and (j)).

volving information technology which will change the interrelationships among law, government and international commerce. Thus, the Court must accept these Petitions to review the Second Circuit's interpretation of the law passed by Congress specifically designed to address the issues raised by new technology, and thereby effect a comprehensive reformulations of the relationships between our current commercial laws and the way we do business in the future on the "Electronic Super Highway."

Based on the above the Petition for writ of certiorari should be granted.

Respectfully submitted,

By: 
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